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# TORT AS A LITIGATION LOTTERY: A MISCONCEIVED METAPHOR

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**Abstract:** For over forty years, tort reform proponents have disparaged the tort system as a lottery, arguing that it produces arbitrary outcomes. This criticism has been offered as justification for reform proposals that would replace the tort system with some form of no-fault accident insurance. We do not oppose no-fault alternatives to tort, but this Essay is not the place to weigh the merits of one or another such proposal. Our purpose here is the more limited one of discrediting the lottery metaphor as applied to the tort system. We make three claims. First, this metaphor obscures the tort system's shortcomings more than it clarifies them. Second, no-fault accident insurance plans fail to resolve the problem of arbitrariness, regardless of how carefully the plan is designed. Third, arbitrariness is endemic in compensation systems, which all set coverage limits that create horizontal inequities among claimants with similar injuries and reduce predictability in the many borderline cases. In light of these three points, we maintain that reformers must more carefully compare the nature and sources of arbitrariness in all compensation systems before embracing any particular system. Such analysis, we believe, will discourage the kind of oversimplification that the lottery metaphor encourages.

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*[T]he fault system is little more than an immoral lottery for both plaintiffs and defendants.*

—Marc A. Franklin<sup>1</sup>

*The operation of the tort system is akin to a lottery.*

—Jeffrey O'Connell<sup>2</sup>

*Our current personal injury law system is not a system of justice; it is a lottery.*

—Stephen D. Sugarman<sup>3</sup>

*[T]he [tort] system is about as fair as a lottery. In fact it is not too much to say that it is a lottery, a lottery by law.*

—P.S. Atiyah<sup>4</sup>

*The nature of a litigation lottery is that the availability of potentially huge damages justify [sic] bringing a meritless claim, so long as there is some small chance that the combination of an outlier judge and an outlier jury will produce a jackpot that compensates for the risk that the judge/jury combination will get it right.*

—Ted Frank<sup>5</sup>

#### INTRODUCTION

For over forty years, tort reform proponents have disparaged the tort system as a lottery, arguing that it produces arbitrary outcomes.<sup>6</sup> Tort doctrine, they allege, awards compensation and imposes liability based on considerations unrelated to what the parties deserve.<sup>7</sup> Moreover, they assert, litigation outcomes are determined by adventitious, contingent factors—the availability of evidence, the quality of counsel, the limits of insurance coverage, the financing of the litigation, the caprices of judges and juries, and many other factors that are not condu-

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<sup>1</sup> Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 778 (1967).

<sup>2</sup> JEFFREY O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* 8 (1979).

<sup>3</sup> STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS*, at xviii (1989).

<sup>4</sup> P.S. ATIYAH, *THE DAMAGES LOTTERY* 143 (1997).

<sup>5</sup> Ted Frank, *Thoughts on the Litigation Lottery*, POINT OF LAW, (July 11, 2005, 6:31 PM), <http://www.pointoflaw.com/archives/001307.php>.

<sup>6</sup> See *infra* notes 15–23 and accompanying text.

<sup>7</sup> See *infra* notes 15–51 and accompanying text.

cive to the consistent application of law.<sup>8</sup> The tort system, by this account, is both unfair and unpredictable.

These criticisms have often served as justification for reform proposals that would replace the tort system with some form of no-fault accident insurance in order to provide fairer and more reliable compensation to accident victims.<sup>9</sup> Under these proposals, negligent conduct would be deterred by insurance premiums paid directly into compensation funds by risk creators or public agencies, by subrogation actions brought against injurers by insurers seeking reimbursement for paid claims, and by criminal sanctions and administrative penalties.<sup>10</sup>

In this Essay, we make three claims intended to discredit the lottery metaphor as applied to the tort system. First, this metaphor obscures the tort system's shortcomings more than it clarifies them.<sup>11</sup> We agree, of course, that tort outcomes produce horizontal inequities among accident victims with similar injuries, and that outcomes can also be unpredictable. Our initial point, however, is that the comparison to random selection by lottery both misrepresents how the tort system decides cases and exaggerates its unpredictability.

Second, no-fault accident insurance plans fail to resolve the problem of arbitrariness, and this is true regardless of how carefully the plan

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<sup>8</sup> See *infra* notes 15–51 and accompanying text.

<sup>9</sup> See *infra* notes 10, 52–77 and accompanying text. Although scholars have developed a rich variety of proposals to replace tort with no-fault insurance, the thrust of tort reform in the last four decades has been less ambitious efforts to tinker with the existing system, particularly by setting caps on recovery. See Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 525–38 (2002) (discussing the relationship between tort reform efforts by the states and by the U.S. Congress); Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1565–75 (2009) (analyzing the role of tort law in the federalist system); Ralph Peeples & Catherine T. Harris, *Learning to Crawl: The Use of Voluntary Caps on Damages in Medical Malpractice Litigation*, 54 CATH. U. L. REV. 703, 726–42 (2005) (proposing the use of voluntary caps on damages). See generally Joseph Sanders & Craig Joyce, “Off to the Races”: *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990) (discussing tort reform efforts during the 1980s in the United States, particularly in Texas). Our analysis in this Essay focuses on the use of the lottery metaphor as a justification for no-fault insurance, and we argue that no-fault insurance is similarly vulnerable to claims of arbitrariness. Although we do not discuss other forms of tort reform here, it is worth noting that damage caps and other related incremental reform efforts can also be regarded as arbitrary limitations. See Mark Geistfeld, *Placing a Price on Pain and Suffering*, 83 CALIF. L. REV. 773, 789–96 (1995).

<sup>10</sup> See, e.g., ATIYAH, *supra* note 4, at 174 (criminal sanctions); TERENCE G. ISON, *THE FORENSIC LOTTERY: A CRITIQUE ON TORT LIABILITY AS A SYSTEM OF PERSONAL INJURY COMPENSATION* 89–94 (1967) (administrative sanctions); O’CONNELL, *supra* note 2, at 187 (subrogation actions); SUGARMAN, *supra* note 3, at 160 (administrative sanctions); Franklin, *supra* note 1, at 781 (criminal and administrative sanctions), 805 (subrogation actions).

<sup>11</sup> See *infra* notes 27–51 and accompanying text.

is designed.<sup>12</sup> Such schemes do eliminate the fault requirement, which reform proponents blame for creating unfair distinctions between accident victims with similar injuries and for making outcomes unpredictable. But a no-fault system's provision that claimants need only prove that their injuries are accident related simply reproduces, by drawing different boundaries, the very problems of horizontal inequity and unpredictability that reform proponents observe and denounce in the tort system.

Third, arbitrariness is endemic in compensation systems.<sup>13</sup> Of necessity, all compensation schemes set coverage limits that inevitably create horizontal inequities among claimants with similar injuries and reduce predictability in the many borderline cases. Although addressing one kind of arbitrariness, no-fault alternatives create other kinds of arbitrariness, and similarly require making pragmatic tradeoffs that must be justified by controversial principles. These structural necessities will entail some unpredictability and horizontal inequity.

We emphatically do not oppose no-fault alternatives to the tort system. The merits of one or another such scheme are not before us in this Essay. Quite to the contrary, our point is that reformers must engage in more careful analysis and comparison of the nature and sources of arbitrariness in all compensation systems before embracing one or another of these systems. Doing so will discourage the kind of oversimplification that the lottery metaphor encourages. This oversimplification illustrates the cognitive problem with metaphorical thinking in legal analysis about which Justice Cardozo cautioned: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."<sup>14</sup>

#### I. THE LOTTERY METAPHOR'S TWO CONCEPTIONS OF ARBITRARINESS

Those who use the lottery metaphor to disparage the tort system contend that the system is arbitrary in two distinct ways. First, they contend, tort doctrine arbitrarily discriminates among similarly situated parties.<sup>15</sup> Consider Marc Franklin's critique: "One is immediately struck by the spectacular legal lottery into which the fault system thrusts the plaintiff. We may posit several identical victims suffering identically disabling injuries, yet one may recover thousands of dollars under the fault rules

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<sup>12</sup> See *infra* notes 15–26 and accompanying text.

<sup>13</sup> See *infra* notes 27–51 and accompanying text.

<sup>14</sup> *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

<sup>15</sup> See, e.g., Franklin, *supra* note 1, at 785–90.

while an equally innocent victim may recover nothing.”<sup>16</sup> Moreover, Franklin continues, “Two defendants who commit identical careless acts may find themselves liable for vastly different amounts depending solely on the fortuitous nature of the harm that results. This is the defendants’ lottery.”<sup>17</sup> By this account, tort doctrine inevitably creates horizontal inequities among accident victims with similar injuries and among injurers who commit similar acts of negligence.<sup>18</sup> We agree with Franklin that the tort system sometimes discriminates among similarly situated victims. The question, however, is whether alternative systems also engender horizontal inequities. We maintain that they invariably do; Franklin and other users of the tort lottery metaphor elide that question.

Reformers assert that tort litigation is also arbitrary in a second sense: outcomes are based on chance rather than principle.<sup>19</sup> Consider Jeffrey O’Connell’s use of the lottery metaphor:

Most crucial criteria for payment are largely controlled by chance: (1) whether one is “lucky” enough to be injured by someone whose conduct or product can be proved faulty; (2) whether that party’s insurance limits or assets are sufficient to promise an award or settlement commensurate with losses and expenses; (3) whether one’s own innocence of faulty conduct can be proved; and (4) whether one has the good fortune to retain a lawyer who can exploit all the variables before an impressionable jury, including graphically portraying whatever pain one has suffered.<sup>20</sup>

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<sup>16</sup> *Id.* at 785.

<sup>17</sup> *Id.* at 790. For a similar view, see SUGARMAN, *supra* note 3, at 37, stating that “tort law refuses compensation to many victims who, from the perspective of their need, are as deserving as those who succeed through the system.” Franklin asserts that “the lottery charge applies equally to strict liability.” Franklin, *supra* note 1, at 785; *see also* Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 *LEGAL THEORY* 181, 181–224 (2006) (analyzing the tension between corrective justice in tort law and an egalitarian commitment to fairness).

<sup>18</sup> *See* Franklin, *supra* note 1, at 785–90.

<sup>19</sup> *See* O’CONNELL, *supra* note 2, at 8, 77, 82.

<sup>20</sup> *See id.* at 8. Although O’Connell characterizes these factors as the products of chance, they are analytically distinct. The non-availability of evidence may—for example in cases of spoliation—be deliberate and relevant to the fairness of outcome. The quality of lawyering is likely to be a function, at least in part, of what parties can afford, making it not the product of chance, but rather of a structural bias in favor of those with greater ability to pay for legal representation. By contrast, jury composition is, at least in principle, random. We argue below in Part II that the lottery metaphor obscures these significant distinctions in its analysis of the determinants of tort outcomes.

Atiyah similarly argues that the tort system is a lottery insofar as it is “pure chance whether [a person’s injuries] were caused by someone’s fault or not,” and it is “a matter of

Jury verdicts, continues O'Connell, are no better than the "flip of a coin."<sup>21</sup> Like a game of chance, he contends, "whenever a case goes to a jury, the jury can decide the case *either way* and be right!"<sup>22</sup> For him, the tort system is an unpredictable "gamble."<sup>23</sup> We consider this claim, and the implicit comparison it makes with other compensation systems, at greater length in Part II.<sup>24</sup>

For now, it is enough to observe that the tort system might be arbitrary in the first sense (i.e., horizontal inequity) but not in the second sense (i.e., unpredictability). The system might unfairly discriminate among similarly situated parties but do so consistently—that is, in a perfectly predictable manner. For example, a consistently applied rule that allowed tort recovery only for brown-eyed accident victims would be arbitrary in this first sense but not in the second. A system based on such a doctrine would be unfair yet highly predictable.<sup>25</sup>

Note also that arbitrariness-as-unpredictability is a subcategory of arbitrariness-as-horizontal-inequity. Resolving tort claims on the basis of chance circumstances, such as a coin toss, would also arbitrarily discriminate between similarly situated parties.

These two types of arbitrariness may also coincide in another way. One might believe that tort doctrine relies on considerations, such as fault and the extent of damages, that promote horizontal inequity, and that chance circumstances that determine litigation outcomes create further distortions. By this account, chance circumstances that produce unpredictable outcomes exacerbate the tort system's potential to produce unfair outcomes due to the application of inappropriate doctrinal considerations.<sup>26</sup>

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sheer luck whether witnesses are available, and therefore whether the cause of the accident can be proved." ATIYAH, *supra* note 4, at 147.

<sup>21</sup> O'CONNELL, *supra* note 2, at 77.

<sup>22</sup> *Id.* at 82.

<sup>23</sup> *Id.*

<sup>24</sup> See *infra* notes 27–51 and accompanying text.

<sup>25</sup> What we mean by "predictable" is that, given a set of facts asserted in a claim, one can predict the outcome of the claim in the torts process. This is distinguishable from the predictability of liability *prior* to the occurrence of an accident. A brown-eyed victim rule would be highly predictable in the first sense (once everyone knows the eye color of the victim), but not predictable for potential injurers in the second sense (since the potential injurer would not know the chances of injuring a brown-eyed victim). O'Connell and the reform advocates who employ the lottery metaphor seem concerned with addressing what they see as the post-accident unpredictability of litigation outcomes, not the pre-accident unpredictability of liability. See O'CONNELL, *supra* note 2, at 8, 77, 82.

<sup>26</sup> See *infra* note 43 and accompanying text.

## II. THE LOTTERY METAPHOR OBSCURES THE NATURE, AND EXAGGERATES THE EXTENT, OF ARBITRARINESS IN THE TORT SYSTEM

Reformers are right to express serious concerns about horizontal inequity among both plaintiffs and defendants within the tort system.<sup>27</sup> Plaintiffs with similar injuries are treated differently on the basis of both doctrinal and administrative considerations that are unrelated to the nature of their injuries. By the same token, defendants who commit similar wrongs are treated differently on the basis of considerations that are unrelated to the character and injurious tendency of their actions. Reformers are also accurate in noting the variability of outcomes due to differences in factors like the availability of evidence, financial differences, the quality of counsel, and jury composition.<sup>28</sup>

Unfortunately, the lottery metaphor in no way advances understanding of these problems. To the contrary, it mischaracterizes and exaggerates them. Both a lottery and the tort system discriminate among similarly situated participants. A lottery, however, does so entirely on the basis of random selection, whereas the tort system does so—both in principle and in practice—on the basis of doctrinal principles like fault and damages, procedural and evidentiary requirements, and less formal “rules of thumb”<sup>29</sup> that make tort outcomes considerably more consistent and predictable than a lottery or O’Connell’s coin toss.<sup>30</sup> By dismissing the role of doctrine, procedural requirements, and informal rules that make tort outcomes more consistent and predictable than lottery results or coin tosses, the lottery metaphor obscures the true nature and extent of arbitrariness in the tort system.

According to Franklin, arbitrariness—differential treatment of similarly situated parties—results from attempting to accommodate two

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<sup>27</sup> See SUGARMAN, *supra* note 3, at 37; Franklin, *supra* note 1, at 785–90.

<sup>28</sup> See O’CONNELL, *supra* note 2, at 8. As we noted above, although factors like these contribute to variability of outcomes, they are not all matters of chance. See *supra* note 20; see also David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive Damage Award?*, 57 MD. L. REV. 174, 183–201, 215–33 (1998) (presenting an economic model of compensatory and punitive awards); Eric Heland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27, 33–53 (2003) (examining how the race and income of jury pool members affect tort awards).

<sup>29</sup> See generally H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 232–43 (2d ed. 1980) (discussing the use of informal norms in the processing and settlement of tort claims).

<sup>30</sup> See O’CONNELL, *supra* note 2, at 77.



competing goals within a single institution.<sup>31</sup> Franklin suggests that the fault principle, which aims to condemn and deter negligent conduct, creates horizontal inequity between accident victims with similar injuries.<sup>32</sup> He further suggests that the doctrinal principle that negligence liability is based on the extent of the resulting harm, which serves the goal of compensating victims, arbitrarily distinguishes between actors who commit similar acts of negligence but inflict different amounts of harm.<sup>33</sup> When we add to compensation and deterrence additional goals or constraints—such as administrative costs, procedural and evidentiary rules, and the division of labor between judge and jury based on institutional competence—the effect of such distinctions is multiplied.

Nonetheless, the tort process of determining outcomes is fundamentally different from that of a lottery. Lotteries, of course, discriminate between winners and losers without regard to their individual circumstances or conduct. But these outcomes are based on random selection: that is their very nature and purpose. By contrast, what Franklin describes in the tort system is a more consistent, predictable pattern of discrimination among victims and injurers based on the application of principles.<sup>34</sup> Tort law treats those injured by wrongful conduct as deserving recourse unavailable to those harmed either by “acts of God” or an “innocent” human actor.<sup>35</sup> Moreover, in contrast with criminal sanctions, which generally focus on intent and conduct *per se*, tort links the injurer’s responsibility to the damage caused.<sup>36</sup> One can plausibly object to both of these rules, but not on the ground that they produce random outcomes.

The kind of arbitrariness that Franklin describes gives losers in tort cases grounds to challenge outcomes as unfair.<sup>37</sup> Those denied compensation can point to the unfairness of compensating others with similar injuries. Moreover, they can also claim that the doctrinal rules were wrongly applied.<sup>38</sup> Lottery losers have no such grounds for complaint—

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<sup>31</sup> See Franklin, *supra* note 1, at 790.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.* Although distinctions between negligent actors on the basis of the harms they cause may be arbitrary from the point of view of what they “deserve,” such distinctions are not arbitrary from the point of view of an efficiency theory of tort law, which sees the function of liability as internalizing costs in order to promote optimal risk reduction. See *id.* at 785–90.

<sup>34</sup> See *id.* at 785, 790.

<sup>35</sup> See *id.* at 785.

<sup>36</sup> See *id.* at 790.

<sup>37</sup> See Franklin, *supra* note 1, at 785, 790.

<sup>38</sup> See O’CONNELL, *supra* note 2, at 8, 77, 82.

indeed, lottery outcomes *must* be randomly generated in order to be fair. Thus, the tort system's arbitrariness, highlighted by Franklin's critique, results from the more or less consistent (i.e., non-random) application of doctrinal rules that can be criticized as unfair, whereas a lottery's arbitrariness is random and thus fair.<sup>39</sup>

O'Connell's assertion that tort outcomes, like lottery results, are based on chance rather than principle obscures a fundamental difference between the unpredictability of tort and lottery outcomes. At the same time, he exaggerates the former. According to O'Connell, recovery in tort depends upon contingent circumstances such as whether the plaintiff's injury was caused by a negligent actor and whether the defendant is capable of satisfying a judgment.<sup>40</sup> Similarly, winning a lottery depends on chance circumstances such as whether an entrant was able to purchase a ticket that day. This comparison, however, ignores an important difference. In the tort system, these chance circumstances provide the factual basis for determining the outcome of a claim. Judges and juries adjudicate claims by applying a system of doctrinal rules to these facts, and attorneys settle claims by applying less formal rules of thumb to the facts.<sup>41</sup> By contrast, in a lottery, chance circumstances determine only eligibility to participate in the lottery. The lottery then selects at random among eligible participants. Once eligibility to participate in the lottery is settled, chance circumstances that determine an individual's eligibility play no further role within the process of random selection. At the decision-making stage, the tort system in principle and often in practice is based on judgments about how rules apply to facts, quite unlike the process of random selection in lotteries.

We harbor no illusions that the tort system is perfectly consistent and predictable. Far from it. Judgments about how to interpret rules or how rules apply to facts will often vary among individuals for many reasons, including ambiguity in the rules, facts that are incomplete or can be interpreted in various ways, differences in expertise or access to witnesses, and cultural or ideological diversity among judges and juries.<sup>42</sup> We recognize also that factors highlighted by critics of the tort system—

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<sup>39</sup> We say "more or less" consistent application of doctrinal rules in recognition of irreducible uncertainties in application.

<sup>40</sup> See O'CONNELL, *supra* note 2, at 8.

<sup>41</sup> See ROSS, *supra* note 29, at 239; Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1589, 1627–28 (2004).

<sup>42</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 211–12 (2008) (suggesting that the variability in pain and suffering and punitive damage awards makes the tort system like a lottery).

the availability of evidence, the limits of insurance coverage, the quality of counsel, and jury composition—exacerbate variability.<sup>43</sup> Nevertheless, the outcome variability produced by such factors does not equate the tort process to random selection by lottery. There is evidence that, despite this variability, “[c]ourt awards are a highly predictable process” and “attorneys . . . seem to be able to substantially anticipate how courts dispense those awards.”<sup>44</sup>

Some critics suggest that this general predictability notwithstanding, the tort system produces random errors that result in large lottery-like payouts to fraudulent claimants.<sup>45</sup> Ted Frank claims that

[t]he nature of a litigation lottery is that the availability of potentially huge damages justify [*sic*] bringing a meritless claim, so long as there is some small chance that the combination of an outlier judge and an outlier jury will produce a jackpot that compensates for the risk that the judge/jury combination will get it right.<sup>46</sup>

Outlier decisions do not make tort litigation a lottery, however. The possibility that a judge will misapply the law or a jury will misconstrue the facts is not even remotely like random selection in a lottery. It makes no sense to argue that a lottery winner should not have won. By contrast, one can coherently characterize litigation outcomes as erroneous because litigation outcomes, unlike a lottery, are determined by judgments about rules and facts, and most of the litigation rules are

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<sup>43</sup> See O’CONNELL, *supra* note 2, at 8.

<sup>44</sup> Evan Osborne, *Courts as Casinos? An Empirical Investigation of Randomness and Efficiency in Civil Litigation*, 28 J. LEGAL STUD. 187, 203 (1999); see also STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 238 (1995) (analyzing orderly patterns that account for variation in jury awards); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 633–37 (1997) (finding that juries only rarely award punitive damages and seem most reluctant to do so in products liability and medical malpractice cases); Neil Vidmar & Mirya R. Holman, *The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts: A New Audit*, 43 SUFFOLK U. L. REV. 855, 869–72 (2010) (presenting data that suggest case-type patterns in jury awards of punitive damages); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 897 (1993) (finding that juries provided more stable estimates of noneconomic damages in medical malpractice cases than would be obtained from a single arbitrator or judge).

<sup>45</sup> See, e.g., David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2025, 2029 (2006); Frank, *supra* note 5.

<sup>46</sup> Frank, *supra* note 5.

designed—not exclusively but in large part—to increase accuracy.<sup>47</sup> Indeed, this is the rationale for an appellate process, which would play no re-evaluative role in a lottery system.

Moreover, suggesting that a decision procedure's error rate makes it a lottery is a category mistake: the very possibility of identifying an outcome as erroneous logically renders the procedure non-random and, therefore, not a lottery. To be sure, the error rate of a decision procedure could be so high as to render outcomes so unpredictable and unsystematic that they would seem random. But tort critics offer no persuasive evidence that high damage awards based on erroneous findings of liability are anything but statistical outliers.

One might argue that there is randomness in whether an individual who files a spurious tort claim will be lucky enough to draw the rare judge or jury who will produce an erroneous judgment in his or her favor.<sup>48</sup> But a random distribution of errors does not make a flawed process into a random one. Although bank depositors stand a random chance of an accounting error in their favor, this randomness does not make depositing one's money in a bank tantamount to playing a lottery. Even though errors in the banking system may be randomly distributed, they are rare enough that depositors do not consider the system either unpredictable or unreliable. Similarly, as long as they are relatively rare, random errors do not make the tort system a lottery.

Of course, at some point, all of the factors that contribute to the variability in tort outcomes and the frequency of errors could be so influential that, taken together, they would create sufficient arbitrariness to render the tort system tantamount to a lottery. Our argument is premised on the belief that the system is far from reaching this point. But we concede that this is, to a considerable extent, a matter of judgment. In addition to our arguments concerning the predictability of tort outcomes, our judgment relies on the fact that hard-eyed parties,

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<sup>47</sup> Some litigation rules reduce accuracy but promote other values. For example, the marital confidences privilege may prevent disclosure of information relevant to the adjudication of a tort claim in order to protect marital privacy.

<sup>48</sup> Note that the distribution of erroneous outcomes is not really random since it predictably varies with the impartiality of the judge and jury. Variability due to bias is a problem that should be minimized, consistent with other goals and constraints, but it is not random. For an example of recent attempts to address this problem by restricting forum shopping, see H.R. 1603, 52d Leg., 1st Reg. Sess. (Okla. 2009), an Oklahoma bill allowing courts to move cases that are more properly heard somewhere else in the state, thus restricting forum shopping; H.R. 755, 79th Leg., Reg. Sess. (Tex. 2005), a Texas bill giving trial court judges discretion to dismiss lawsuits with little or no connection to Texas; and H.R. 13, 2004 Leg., 1st Extraordinary Sess. (Miss. 2004), a Mississippi bill instituting numerous venue reforms to prevent forum shopping.

their lawyers, and liability insurers bet huge amounts of money on the assumption that the system is more or less predictable.<sup>49</sup>

Critics of the tort system invoke the lottery metaphor to suggest that tort is arbitrary in ways that justify replacing it with alternative compensation schemes and administrative penalties for deterrence purposes.<sup>50</sup> So far, we have argued that the lottery metaphor obscures the nature of arbitrariness in the tort system and exaggerates its unpredictability. That being so, the metaphor is primarily a rhetorical strategy aimed at undermining public confidence in the tort system in order to strengthen popular support for various reforms.<sup>51</sup> Such rhetoric does not advance careful analysis of tort reform. Nor does it illuminate whether alternative systems of compensation and deterrence would invariably address these concerns in a satisfactory fashion. The Part that follows addresses this latter question.

### III. NO-FAULT INSURANCE AND ADMINISTRATIVE ALTERNATIVES TO THE TORT SYSTEM DO NOT ELIMINATE ARBITRARINESS

The lottery metaphor aside, a legitimate concern about arbitrariness in tort outcomes remains. Many reform advocates have long proposed replacing tort liability with no-fault accident insurance combined with a system of risk-related premiums, assignability of tort claims to insurers, and administrative penalties to deter negligent conduct.<sup>52</sup> Arguably, replacing tort liability with no-fault accident insurance would both compensate more victims and reduce administrative costs.<sup>53</sup> Al-

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<sup>49</sup> See *supra* note 44 and accompanying text.

<sup>50</sup> See *supra* notes 1–5, 17–25 and accompanying text.

<sup>51</sup> For extended analysis of the rhetorical strategies of tort reform efforts, see DANIELS & MARTIN, *supra* note 44, at 15–26, 94–114, 200–13, and WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 147–81 (2004).

<sup>52</sup> See, e.g., ATIYAH, *supra* note 4, at 174 (criminal sanctions); ISON, *supra* note 10, at 89–94 (administrative sanctions); O'CONNELL, *supra* note 2, at 187 (assignability of tort claims to insurers); SUGARMAN, *supra* note 3, at 160 (administrative sanctions); Franklin, *supra* note 1, at 781 (criminal and administrative sanctions), 803 (risk-related premiums); *id.* at 805 (assignability of tort claims to insurers).

<sup>53</sup> See O'CONNELL, *supra* note 2, at 160–61. The administrative efficiency of alternative compensation systems varies widely. See Div. of Fed. Emps.' Comp., *Federal Employees' Compensation Act*, U.S. DEP'T OF LABOR, <http://www.dol.gov/owcp/dfec/regs/compliance/fecafact.htm> (last visited Dec. 21, 2010) (noting that four percent of workers' compensation benefits are applied to overhead administrative costs); JASON FURMAN, CTR. ON BUDGET AND POLICY PRIORITIES, *TOP TEN FACTS ON SOCIAL SECURITY'S 70TH ANNIVERSARY* 5 (2005), available at [http://www.cbpp.org/files/PolicyBasics\\_SocSec-TopTen.pdf](http://www.cbpp.org/files/PolicyBasics_SocSec-TopTen.pdf) (noting that Social Security administrative costs accounted for 0.6% of total retirement and survivors benefit payments in 2005); 2007 OFF. OF WORKERS' COMP. PROGRAMS ANN. REP. 7, available at

though these gains might justify replacing tort liability with one or another no-fault insurance alternative, this type of reform cannot eliminate all arbitrariness.<sup>54</sup>

Franklin, a leading no-fault proponent, argues that first-party no-fault accident insurance would eliminate the arbitrariness of fault-based tort liability.<sup>55</sup> In replacing the tort system, explains Franklin, “[t]he focus should be upon the victims of disabling accidents, and upon providing similar treatment for similarly situated persons suffering similar injuries.”<sup>56</sup> Whereas the fault system treats accident victims with similar injuries differently based on whether or not the injury was negligently caused, reformers argue that first-party no-fault accident insurance would treat them similarly, promoting horizontal equity among injury victims.<sup>57</sup>

In fact, first-party no-fault accident insurance also fails to treat like victims alike: it simply creates different boundary issues than tort.<sup>58</sup> Under first-party no-fault accident insurance, only individuals whose harm was caused by *accidents* would receive compensation.<sup>59</sup> That is, individuals suffering identical harms fare differently depending upon what caused their harm. A person who loses a leg in an accident receives compensation, but a diabetic whose leg is surgically amputated does not. Similarly, a person who suffers brain injury as a result of an accident would be compensated, but a person afflicted with Alzheimer’s disease would not. The requirement of accidental injury would, in Franklin’s terms, discriminate between individuals with similar injuries—a manifest failure to treat like cases alike.<sup>60</sup>

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<http://www.dol.gov/owcp/07owcpmx.pdf> (noting that, in 2007, Federal Employee Compensation Act administrative expenditures were \$154.9 million: \$144.1 million, or 5.3% of total program costs, went to compensation and benefit payouts via the Office of Workers’ Compensation Programs); *see also* JAMES M. ANDERSON ET AL., THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE 63, 131 (2010) (prepared by the RAND Institute for Civil Justice).

<sup>54</sup> As indicated earlier, the focus of tort reform in the past four decades has been incremental reforms, such as damage caps, which are also subject to charges of arbitrariness. *See* Geistfeld, *supra* note 9, at 789–96.

<sup>55</sup> Franklin, *supra* note 1, at 795–98.

<sup>56</sup> *Id.* at 795.

<sup>57</sup> *See* O’CONNELL, *supra* note 2, at 181–83, 187–205; SUGARMAN, *supra* note 3, at 103–10; Franklin, *supra* note 1, at 795.

<sup>58</sup> *See* O’CONNELL, *supra* note 2, at 181–82; Franklin, *supra* note 1, at 777.

<sup>59</sup> *See* O’CONNELL, *supra* note 2, at 181–82; Franklin, *supra* note 1, at 777.

<sup>60</sup> *See* Franklin, *supra* note 1, at 785–90. Franklin was aware of this problem with regard to auto accident no-fault plans. *See id.* at 777. Sugarman, who discusses Franklin’s ideas, also emphasizes that “[v]ictim need is independent of cause or type of injury.” SUGARMAN, *supra* note 3, at 110–13.

A no-fault proponent might deny that first-party no-fault accident insurance arbitrarily discriminates between similarly situated individuals. Such a proponent might argue, for example, that the goal of such a system is to compensate accident victims and that benefit-eligibility principles, which distinguish accident victims from those who incur similar harms (but from different causes), are entirely consistent with this goal. This putative response, however, is merely a tautology. With equal logic, one could simply define the tort system's goal as compensating victims of negligence and then insist that the fault requirement is entirely consistent with this goal, so that individuals with identical injuries—one caused by negligent conduct and the other not—are not similarly situated in terms of that goal.

Of course, there are good reasons to limit no-fault insurance proposals to accident victims—for example, limited resources or special solicitude for those who have been injured by other people rather than by natural forces or illness. But these reasons nonetheless determine winners and losers arbitrarily, in Franklin's sense of the term, by treating differently individuals who have similar injuries.<sup>61</sup> Moreover, no-fault schemes, in practice, are arbitrary in another important respect. Common features of no-fault schemes—such as ceilings on recovery for lost income, scheduled recovery for physical injuries and permanent partial disabilities, and elimination of non-economic loss recovery—subject all victims to identical recovery limits even where they suffer different losses.<sup>62</sup> None of this means that extending compensation to all victims of accidental injury on a no-fault basis is undesirable. Rather, our point is that a concern about arbitrariness in the tort system is not by itself a sufficient reason for such reform: no-fault insurance alternatives to the tort system also introduce arbitrariness, but now in the form of coverage limitations.

Beyond the arbitrariness associated with boundary issues and ceilings or exclusions on recovery, internal characteristics of the schemes create the potential for uncertainty of coverage.<sup>63</sup> For example, workers' compensation claims require not only a determination of whether an injury is job related, but also an assessment of the extent of worker im-

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<sup>61</sup> See Franklin, *supra* note 1, at 777–78.

<sup>62</sup> See, e.g., N.Y. INSURANCE LAW §§ 1502–1504 (McKinney 2009); N.Y. WORKERS' COMPENSATION LAW § 15 (McKinney 2010).

<sup>63</sup> See *infra* notes 64–69 and accompanying text.

pairment and disability.<sup>64</sup> These issues are particularly difficult to resolve in claims involving intangible harm (such as mental stress and toxic exposure) as well as in determinations of permanent partial disability.<sup>65</sup> New Zealand's no-fault accident compensation scheme similarly requires determining whether a claim falls into a category of compensable harms—for example, whether a health condition is sufficiently related to medical treatment rather than merely the product of illness—and assessing the extent of an accident victim's inability to work and lost earnings.<sup>66</sup> In both systems, coverage limits and loss assessment guidelines tend to be general and difficult to apply.<sup>67</sup> Moreover, factual disputes and conflicting evidence add to the unpredictability of outcomes in workers' compensation claims and in New Zealand's no-fault scheme.<sup>68</sup> Thus, a shift from tort to no-fault insurance eliminates neither arbitrariness nor unpredictability, but merely relocates the source of these problems from

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<sup>64</sup> See EVANGELOS M. FALARIS ET AL., CAUSES OF LITIGATION IN WORKERS' COMPENSATION 11–12 (1995); Leslie I. Boden & Richard A. Victor, *Models for Reducing Workers' Compensation Litigation*, 61 J. RISK & INS. 458, 460 (1994).

<sup>65</sup> See SUGARMAN, *supra* note 3, at 131–32 (discussing the difficulty of evaluating workers' compensation claims for permanent partial disability).

<sup>66</sup> See Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 YALE L. & POL'Y REV. 187, 197–98 (2008) (noting the difficulty of assessing a victim's inability to work and lost earnings); *id.* at 199 (noting the difficulty of determining causation in medical injury claims).

<sup>67</sup> FALARIS ET AL., *supra* note 64, at 12–13; Boden & Victor, *supra* note 64, at 460. For example, in many jurisdictions, statutes and regulations do not provide clear guidance about how to assess permanent impairment and disability. FALARIS ET AL., *supra* note 64, at 12–13; Boden & Victor, *supra* note 64, at 460; Schuck, *supra* note 66, at 197. Moreover, changes in statutes and regulations governing workers' compensation that affect that scope of coverage and the level of benefits create professional uncertainty among attorneys and judges, which is an additional source of unpredictability that is more frequent in workers' compensation than in tort. Telephone Interview with Les Boden, Professor of Env'tl. Health, Bos. Univ. (Jan. 12, 2010) (notes on file with author).

<sup>68</sup> See Schuck, *supra* note 66, at 191–96. We have focused here on workers' compensation and the New Zealand no-fault accident compensation scheme because they seem most closely analogous to the type of no-fault accident insurance that O'Connell has in mind. See O'CONNELL, *supra* note 2, at 157–75. O'Connell himself relies on workers' compensation to argue that no-fault accident insurance is likely to reduce unpredictability. *See id.* at 191–93. O'Connell also relies on no-fault auto insurance. *See id.* at 157–75, 181–82, 191–92. Although he surveys evidence that no-fault auto insurance expands coverage and reduces administrative costs, he does not offer any evidence that outcomes are more predictable than in tort. *See id.* at 157–75. Moreover, modified no-fault laws make no-fault insurance an exclusive remedy only for a subset of auto-related injuries. *See id.* Thresholds beyond which a victim is exempted from mandatory no-fault and can file a lawsuit are defined in general terms such as "serious injury" or dollar amounts. *See id.* at 163–64. These thresholds create unpredictability in terms of coverage and valuation just as they do in tort, workers' compensation, and the New Zealand scheme. *See id.*



fault and the measure of non-economic damages to coverage and the assessment of impairment and disability.<sup>69</sup>

Products liability and medical malpractice—areas that critics of the tort system have singled out as especially in need of reform—illustrate other sources of unpredictability in the administration of no-fault schemes.<sup>70</sup> No-fault compensation for product-related injuries requires a determination of the role of victim contribution—for example, whether an individual who falls off a bicycle or a ladder suffered injury “arising out of” the product and is thus eligible for compensation. No-fault compensation for medical injury, as referred to in the New Zealand example, sometimes requires a determination of the contribution of preexisting conditions to an injury and the compensability of post-treatment distress where medical treatment produces results short of a perfect cure.<sup>71</sup> In contested cases with limited evidence, adjudication of these issues can make outcomes unpredictable.

Of course, no-fault accident insurance might nevertheless be more predictable than tort in certain respects, such as risk manageability. O’Connell seems to imply that litigation makes tort outcomes unpredictable and that no-fault accident insurance would make compensation more predictable by reducing litigation.<sup>72</sup> Litigation rates, however, are not an indicator of unpredictability.<sup>73</sup> As noted earlier, some researchers

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<sup>69</sup> See O’CONNELL, *supra* note 2, at 181–82 (noting the persistence of these types of uncertainty in no-fault insurance alternatives to tort for medical injury and product injury).

One might argue in defense of O’Connell that at least his proposal to replace tort with first-party no-fault accident insurance eliminates the unpredictability in the tort system created by compensation for pain and suffering and other non-pecuniary losses. O’Connell’s proposal for first-party no-fault accident insurance removes this source of unpredictability by simply eliminating recovery for non-economic loss. But one need not abandon tort liability to accomplish this. If one were interested in greater predictability, recovery for non-pecuniary losses could be based on a fixed schedule.

<sup>70</sup> See *id.* at 180–82; Studdert et al., *supra* note 45, at 2024, 2032. See generally Kristie Tappan, Note, *Medical-Malpractice Reform: Is Enterprise Liability or No-Fault a Better Reform?*, 46 B.C. L. REV. 1095 (2005).

<sup>71</sup> See Schuck, *supra* note 66, at 199.

<sup>72</sup> See O’CONNELL, *supra* note 2, at 160, 172. Although comparing the litigation rates of tort and workers’ compensation claims would be complicated, we do know that workers’ compensation claims give rise to a great deal of litigation. See FALARIS ET AL., *supra* note 64, at 4 (noting that, in 1990, almost half of all workers’ compensation indemnity claims in California were litigated). Litigation rates for cases involving permanent partial disability can be even higher. See Boden & Victor, *supra* note 64, at 459. A proper comparison would compare the rates of litigation for tort and workers’ compensation claims involving similar injuries or amount of claim.

<sup>73</sup> See *supra* note 44 and accompanying text.

find that court awards in tort cases are in fact highly predictable.<sup>74</sup> In addition, it bears emphasis that tort is not synonymous with litigation. The overwhelming majority of tort claims settle prior to trial and are frequently resolved on the basis of predictable rules of thumb.<sup>75</sup> Moreover, these considerations stand apart from the filtering out of potential claims that are never brought, which may also reflect predictability in the system.<sup>76</sup> Finally, the predictability of litigation outcomes, both verdicts and settlements, in fact varies among different categories of tort claims and is a salient factor in drawing any reliable conclusions about the comparative predictability of tort and no-fault alternatives.<sup>77</sup>

In sum, no-fault initiatives do not eliminate the need to draw distinctions that treat individuals with similar needs differently, and they require difficult, sometimes unpredictable assessments of causation, impairment, and disability. Although no-fault alternatives offer advantages over tort in terms of expanded coverage and lower administrative costs, they do not put to rest concerns about horizontal equity and unpredictability.

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<sup>74</sup> See *supra* note 44 and accompanying text. Similarly, litigation rates in workers' compensation—which are significant in many jurisdictions—are not an indication of uncertainty. See Boden & Victor, *supra* note 64, at 160–62. A study of workers' compensation claims found that workers' compensation litigation outcomes are highly predictable in some jurisdictions. *Id.* This is because adjudicators regularly “split the difference” between the parties' assessments of worker impairment. *Id.* The lack of clear guidance in state workers' compensation regulations about how to assess permanent impairment leads parties to obtain expert medical opinions that maximize or minimize the claim and then pursue litigation in order to obtain a judgment that, predictably, splits the difference between the parties. *Id.* Pursuing litigation thus makes outcomes *more* predictable. See *id.*

<sup>75</sup> See Ross, *supra* note 29, at 3–5, 239; Issacharoff & Witt, *supra* note 41, at 1589, 1627–28.

<sup>76</sup> See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544 (1980–81) (describing the resolution of most tort grievances prior to filing a lawsuit).

<sup>77</sup> See BUREAU OF JUSTICE, U.S. DEP'T OF JUSTICE, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 4 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tvtvc01.pdf> (examining tort verdicts in general jurisdiction courts in the 75 largest counties of the United States during 2001 and finding the median verdict in medical malpractice cases to be \$422,000 compared to the median verdict for automobile cases of \$16,000). Tort outcomes can also vary within the same tort category. See Studdert et al., *supra* note 45, at 2024 (finding, in an examination of 1452 medical malpractice claims, that for claims in which there was no medical error, payments averaged significantly less (\$313,205), compared to claims where errors occurred (\$521,560)). Although we are unaware of any comparable data regarding settlements, there is reason to believe that settlements vary no more, and perhaps less, than verdicts. Tort settlements are generally negotiated “in the shadow of the law,” at arm's length between knowledgeable lawyers familiar with the facts of the case and the applicable legal principles. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979) (discussing how settlement of divorce claims are influenced by the substantive legal doctrines that would apply were the claims to go to trial).

In addition to no-fault accident insurance, reform advocates propose administrative penalties for negligent conduct as an alternative to tort liability.<sup>78</sup> Stephen Sugarman argues that tort liability is frequently unnecessary to deter unreasonably dangerous conduct, which is substantially discouraged by a combination of “[s]elf-preservation instincts, market forces, personal morality, and governmental regulation (criminal and administrative).”<sup>79</sup> As part of his plan to do away with personal injury law, Sugarman proposes greater reliance on administrative agencies, like the Consumer Product Safety Commission (CPSC), the Occupational Safety and Health Administration (OSHA), and the Environmental Protection Agency (EPA) to regulate risk.<sup>80</sup> He also proposes reforms that would allow for greater citizen participation in prompting investigations and compelling agency action.<sup>81</sup>

Sugarman argues that agencies are better equipped than courts to regulate risk from a variety of perspectives.<sup>82</sup> Whereas courts merely respond to whatever cases come before them, agencies can set their own risk management priorities.<sup>83</sup> In addition, agencies, unlike courts, have powers to investigate risks and the expertise to evaluate the trade-offs of different risk management strategies.<sup>84</sup> And finally, whereas courts are limited to awarding damages and granting injunctions (rarely in tort), agencies have a wider array of risk management tools, such as recalls and the power to impose civil penalties.<sup>85</sup>

Although there is merit in Sugarman’s analysis, administrative risk regulation, whatever its advantages over tort, would not eliminate arbitrariness. To begin with, limited resources lead administrative agencies to be selective in monitoring and enforcement: because of limited resources for inspection and enforcement, each year federal agencies like the CPSC, OSHA, and EPA inspect only a fraction of the regulated enti-

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<sup>78</sup> See, e.g., ISON, *supra* note 10, at 89–94; SUGARMAN, *supra* note 3, at 160; Franklin, *supra* note 1, at 781.

<sup>79</sup> SUGARMAN, *supra* note 3, at 4–6. Unlike Franklin and O’Connell, Sugarman is not proposing a no-fault accident plan, but rather a broader first-party social insurance coverage for injury and disease irrespective of source and type of harm. See *id.* at 161–62.

<sup>80</sup> *Id.* at 154–60.

<sup>81</sup> *Id.* at 159–60.

<sup>82</sup> *Id.* at 156–59.

<sup>83</sup> *Id.* at 154–60.

<sup>84</sup> See *id.*

<sup>85</sup> SUGARMAN, *supra* note 3, at 156–59. For additional analysis of the comparative advantages of administrative regulation as a regulatory tool over tort litigation, see ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 126–55 (2001); PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 363–73 (2000); W. Kip Viscusi, *Overview*, in *REGULATION THROUGH LITIGATION* 1, 1–20 (W. Kip Viscusi ed., 2002).

ties under their jurisdiction and sanction only a small proportion of the violations they are charged with policing.<sup>86</sup> This type of selective enforcement—particularly when it is minimal and/or unsystematic—treats similarly situated wrongdoers differently and makes it difficult to predict whether wrongdoing will be penalized.

There are other important sources of arbitrariness in administrative risk regulation as well. The influence of certain regulated entities over agencies may lead to arbitrary differences in penalizing negligent behavior based on political considerations.<sup>87</sup> Critics of the regulatory system have also argued that professional risk regulators in administrative agencies often simplify risk in terms of expected mortality and morbidity, ignoring features of risk that resist quantification but that are important to lay people when they assess risk—considerations such as the voluntariness, latency, distribution, irreversibility, origin, and concentration of risk.<sup>88</sup> This simplification leads professional risk regulators to value risk differently than lay people.<sup>89</sup> Administrative risk regulation tends to favor professional valuation of risk, whereas tort regulation allows lay people—injury victims—to price risk in their decisions to file claims, settle, or litigate to final judgment. Although there may be reasons to prefer administrative risk regulation, the tendency of risk regulators to ignore hard-to-assess features of risk can appear arbitrary,

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<sup>86</sup> See OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, LIMITED KNOWLEDGE OF THE UNIVERSE OF REGULATED ENTITIES IMPEDES EPA'S ABILITY TO DEMONSTRATE CHANGES IN REGULATORY COMPLIANCE 11 (2005), available at <http://www.epa.gov/oig/reports/2005/20050919-2005-P-00024.pdf> (explaining that the EPA's "monitoring activities focus on major and large entities or sources, which represent only a small fraction of the total universe"); U.S. GEN. ACCOUNTING OFFICE, GAO-04-378, WORKPLACE SAFETY AND HEALTH: OSHA'S VOLUNTARY COMPLIANCE STRATEGIES SHOW PROMISING RESULTS, BUT SHOULD BE FULLY EVALUATED BEFORE THEY ARE EXPANDED 1 (2004), available at <http://www.gao.gov/new.items/d04378.pdf> ("OSHA can only inspect a small fraction of all worksites each year."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-803, CONSUMER SAFETY: BETTER INFORMATION AND PLANNING WOULD STRENGTHEN CPSC'S OVERSIGHT OF IMPORTED PRODUCTS 22–23 (2009), available at <http://www.gao.gov/new.items/d09803.pdf> (finding that the agency's "ability to inspect shipments for potential violations at ports of entry is limited"). For clarification, the U.S. General Accounting Office is now called the U.S. Government Accountability Office. The name was changed on July 7, 2004. *Our Name*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/namechange.html> (last visited Dec. 21, 2010).

<sup>87</sup> See KENNETH J. MEIER, REGULATION: POLITICS, BUREAUCRACY, AND ECONOMICS 9–36 (1985) (providing a general introduction to the relationship between agencies and regulated entities).

<sup>88</sup> See Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1071–78 (1990).

<sup>89</sup> *Id.*; see also CASS SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT, 53–77 (2002) (discussing the difference between popular and expert risk evaluation).

as critics of cost-benefit analysis have long maintained.<sup>90</sup> Thus, neither no-fault insurance nor administrative sanction alternatives to the tort system eliminate the problem of arbitrariness.

#### CONCLUSION

All compensation systems have restrictive categories that engender arbitrariness that cannot be eliminated by merely shifting among categories. Kenneth Abraham and Lance Liebman developed this point almost twenty years ago in an article categorizing compensation systems into those based on fault, cause, and loss.<sup>91</sup> Each type uses categorical restrictions to limit recoveries. In tort, a fault-based system, recovery requires proof that a loss was caused by the defendant's negligence. In no-fault, a cause-based system, recovery depends on establishing that an injury was caused by an accident. In the federal Social Security Disability Insurance (SSDI) system, compensation is based on loss, but claimants recover only if their losses qualify as a permanent disability that renders them unable to work.<sup>92</sup> In each of these systems, the categorical limitation could be regarded as "arbitrary"; in none of these cases, however, is the randomness factor large enough that one can intelligibly regard the limitation as equivalent to a lottery or anything remotely like it.

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<sup>90</sup> See *supra* notes 88–89 and accompanying text. For more on risk evaluation and cost-benefit analyses, see generally COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES (Matthew D. Adler & Eric A. Posner eds., 2001); FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008).

<sup>91</sup> Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 108–09, 117 (1993).

<sup>92</sup> *Disability Planner*, U.S. SOC. SEC. ADMIN., <http://www.socialsecurity.gov/dibplan/> (last visited Dec. 21, 2010). SSDI provides benefits to individuals who have worked in jobs covered by Social Security and who suffer permanent disability that renders them unable to work. Abraham & Liebman, *supra* note 91, at 83–84; *Disability Planner*, *supra*. This is not a basic premise of a loss-based system; it is simply where SSDI draws the eligibility line. See SUGARMAN, *supra* note 3, at 168–90 (providing a more expansive loss-based social welfare approach).

In addition, some systems are hybrids. See Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 616–22 (2000). No-fault automobile insurance in New York, for example, provides exclusive no-fault insurance coverage for economic loss up to \$50,000 resulting from an automobile accident and allows victims who sustain more than \$50,000 in economic loss or suffer serious injury to sue in tort for negligence, creating a system in which recovery may depend upon fault, cause, or loss, or some combination thereof. Comprehensive Motor Vehicle Reparations Act, N.Y. INS. LAW §§ 5102–1504 (McKinney 2009).

These diverse categorical restrictions serve at least two essential purposes. First, they provide a way to ration limited public resources. Injury compensation competes for public resources with myriad other social goals. Government-sponsored systems like the New Zealand accident compensation scheme and SSDI employ such restrictions to define the scope of coverage and to compensate only certain types of losses—respectively, in these two systems, accidental injuries or permanent disabilities—while excluding others. In tort, legal doctrines such as duty and proximate cause limit liability in order to avoid overdetering socially useful activity and to prevent a “flood” of litigation that would overwhelm courts’ own limited institutional resources and impose large social costs.<sup>93</sup> The reality of limited resources—both in terms of funds to pay claims and institutions to adjudicate them—makes categorical restrictions on compensation a practical necessity.

Second, these restrictions help to build the political support needed to establish and maintain compensation systems.<sup>94</sup> Insofar as workplace injuries, accidents, and permanent disability are problems of widespread concern, compensation systems that focus on these sources and types of injuries are more likely to attract political support. In a similar vein, politically salient losses and events—including adverse reactions to childhood vaccines, black lung disease, and the 9/11 terrorist attacks—have generated support for other narrowly-focused compensation systems.<sup>95</sup>

These categorical restrictions inevitably generate concerns about arbitrariness. Abraham and Liebman develop the point in the context—far removed from tort—of SSDI eligibility determinations.<sup>96</sup> Their analysis suggests that SSDI eligibility determinations based on a binary yes-no test arbitrarily treat individuals with similar disabilities differently and that the subjective nature of the judgments required to make these determinations leads to unpredictable outcomes.<sup>97</sup> Appreciating these

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<sup>93</sup> See Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. (forthcoming 2010). The term “flood” of litigation is another metaphor applied to tort litigation that is used in rhetorically strategic ways. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 65 (1983); Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1198–1202 (2009).

<sup>94</sup> SUGARMAN, *supra* note 3, at 103 (“Political considerations also play a role in determining which sorts of accidents are addressed by compensation schemes.”).

<sup>95</sup> For further discussion, see Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 703–13 (2005).

<sup>96</sup> Abraham & Liebman, *supra* note 91, at 110.

<sup>97</sup> *Id.* Abraham and Liebman explain:

problems in the SSDI system illuminates why a critic of the tort system concerned about arbitrariness must do more than simply advocate no-fault or social insurance alternatives as a solution. Instead, the tort skeptic must articulate baseline social welfare premises and then choose among various forms of arbitrariness by justifying why some are more objectionable than others and why proposed systemic reforms will strike a better balance.

For more than forty years, proponents of tort reform have frequently invoked the lottery metaphor to emphasize the problem of arbitrariness in the tort system and to urge that tort be replaced by no-fault accident insurance and administrative risk regulation. We have argued that the metaphor is inapt because tort law, for all its flaws, is far from being a lottery-like system of random outcomes, and because the metaphor fails to recognize that arbitrariness is a characteristic feature of any compensation system that imposes categorical restrictions. As a consequence, shifting from tort to insurance cannot eliminate arbitrariness—although it may, in some respects and at some cost, reduce it. Reform must focus not on the existence of categorical restrictions in such systems, but on the form, content, justification, and number of these restrictions and the policy tradeoffs that they entail. At this point, at least one thing is certain: the lottery metaphor has obscured, rather than illuminated, thinking about tort reform, and it is time to retire it.

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By imposing the requirement of total disability, SSD and most private disability insurance programs do not provide compensation for partial disabilities—those that prevent a person from engaging in a prior occupation but do not completely eliminate that person's ability to work. This requirement makes eligibility a yes-no question, with a claimant being found completely ineligible or fully eligible. A substantial percentage of all applicants are near the borderline of eligibility: something is wrong with them, perhaps they could work with difficulty or pain, and while it is reasonable for society to exempt them from further employment, others with similar difficulties continue to work.

The requirement of total disability is a major cause of the dissatisfaction with the outcomes of the vast adjudication system that labors to make SSD eligibility decisions. Because an individual's application requires such a subjective determination, and because so many of the cases are near the yes-no line, every student of the system concludes that outcomes depend on which decision maker sees a case, where in the country an application is filed, and what words a physician may have chosen to describe a condition.

Abraham & Liebman, *supra* note 91, at 110.